

Canada and the Renegotiation of NAFTA: What's Happening with the Investor-State Dispute Settlement (ISDS)?

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The re-negotiation of NAFTA ramped up again this week as Canada's Minister of Foreign Affairs Chrystia Freeland heads back to Washington for talks on Thursday. The business press is calling this latest round of talks crucial.

Bloomberg News reported (Sept. 17),

"Without a deal this week, there's likely little hope that text of a trilateral pact can be published by Sept. 30 ... If text isn't published by then, a deal probably can't be signed before Andras Manuel Lopez Obrador takes office as Mexico's president Dec. 1. Then the next step would be up [to] the U.S. - it could extend the clock a bit for further talks, or ramp up fights with Canada and Congress by trying to go ahead with Mexico only." [1]

Significant issues remain to be settled between Canada and the U.S. Bloomberg News is reporting that those "core" issues include: cultural exemptions, dairy, cross-border shopping, pharmaceuticals, intellectual property, and dispute panels. [2] In the latter category, Bloomberg mentions only Chapter 19 (the panels that deal with dumping and tariffs). No mention is made of Chapter 11 and the investor-state dispute settlement (ISDS) clause that allows foreign companies to sue governments for lost future profits (in secret and private tribunals) if they feel their investments have been treated unfairly by government policy.

With Chapter 11 (and ISDS) not mentioned by Bloomberg, does that mean it's been sorted out by the NAFTA negotiators? At this point, only the negotiators know for sure, and they're not saying. But here's a clue: on September 12, more than 300 U.S. state lawmakers released a letter stating that they "strongly support" U.S. Trade Representative Robert Lighthizer's efforts to eliminate NAFTA's ISDS system. [3]

Maralyn Chase, a Democratic state senator from Washington State told truthout.org,

"If reports are true - that ISDS has been largely gutted from NAFTA - and if that's in the final text, that would be an immense improvement for state lawmaking." [4]

Truthout.org reported (Sept. 13),

“Negotiations with Canada are ongoing, but the US recently announced a preliminary agreement to rework NAFTA between Canada and Mexico. Under that version of the deal, ISDS would be eliminated in Canada and the U.S. In Mexico, ISDS would be heavily scaled back ... [and] would only be available in cases involving the direct expropriation of property by the government.” [5]

However, a CBC News report (Sept. 8) says that in the preliminary agreement between the U.S. and Mexico,

“the two countries wanted ISDS to be ‘limited’ to cases of expropriation, bias against foreign companies, or failure to treat all trading partners equally.” [6]

This same report suggests that “‘old-fashioned ISDS’ would remain in play for certain sectors: oil and gas, infrastructure, energy generation and telecommunications” that have contracts with the government.

Politico.com has reported (Aug. 20) that

“The U.S. wants only companies that are headquartered in the U.S. and led by a ‘U.S. person’ to be eligible to file investment claims. That would preclude U.S. subsidiaries of foreign parent companies from using the dispute mechanism...” [7]

Obviously, nothing can be said with certainty until (and if) the text of the preliminary agreement is released. But major industry groups in Canada and the U.S. have been fighting to preserve the ISDS system in NAFTA, including the Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, the American Petroleum Institute, the American Legislative Exchange Council (ALEC), and others.

Tellingly, less than a month ago, Zero Hedge reported (Aug. 25) that Mexico and Canada have “favored keeping the [ISDS] provisions, believing they bolster the confidence of investors.” [7]

Of the three NAFTA governments, Canada has been sued the most often under ISDS, and in 41 lawsuits (that we know of), Canada has already paid out more than \$200 million in settlements, well over \$67 million in legal fees, faces a \$570 million charge under the recent tribunal ruling on Bilcon, and still faces billions more in ISDS lawsuits under NAFTA. Nonetheless, the Canadian federal government under Prime Minister Justin Trudeau (and Stephen Harper before him) has long insisted on retaining ISDS in its various trade deals and investment treaties.

While media pundits have called that insistence “odd” and “curious” and “inexplicable”, I decided to try to find the explanation for it.

In my latest book, *Bypassing Dystopia*, published in May 2018 (Watershed Sentinel Books) I devote a lengthy section to unravelling the mystery of why Canada keeps on insisting on ISDS in trade deals.

What I found isn’t pretty. As it turns out, it’s not only fat-cat Canadian lawyers and legal firms that make a bundle off ISDS, but also third-party funders of the lawsuits, and entire

industries like the Canadian mining industry. Canadian federal administrations have not only been reluctant to jettison ISDS, they have even assisted Canadian corporations in launching at least 55 such lawsuits, usually because of a target government's environmental policies. As a result, Canadian multinational corporations and investors are the fifth most prolific users of ISDS lawsuits in the world, according to international statistics.

But now the investor-state dispute settlement clause has become so widely known by the public and so widely hated across most of the planet, that the list of countries that refuse to sign trade or investment deals which include ISDS is growing: India, South Africa, Indonesia, Ecuador, Venezuela, Australia, Bolivia, Argentina, Norway, and even members of the EU are balking at full ratification of the Canada-EU deal (CETA) because of it.

Now, even the Trudeau government appears to be getting the message.

On September 8, CBC News reported that on August 14,

“Canada launched a public consultation period ... to review all its foreign investment treaties - including 34 bilateral investment treaties as well as the investment provisions included in an additional 20 trade agreements.” [8]

International Trade Diversification Minister Jim Carr told CBC News that

“the consultation amounts to the first ‘major review’ of Canada’s investor protection agreements in a decade.”

As far as I can determine, that CBC report of Sept. 8 (more than 2 weeks after the launch of the public consultation) was the first (and still only) mention of it in the press. To date, no NGO in Canada has mentioned this public consultation: not even the Council of Canadians, which has long fought against ISDS and other controversial trade issues.

Half-heartedly or not, the Canadian government is asking Canadians to provide input on its review of ISDS and some other issues. Navigating the government website can be confusing, but here is the method I used to reach the appropriate online consultation form. Google “government of Canada public consultations trade”; click on “Free Trade Agreements (FTA) Consultations - Global Affairs Canada”; then click on “Active consultations: Consulting Canadians on the renegotiation of NAFTA with the U.S. and Mexico.”

They probably expect no members of the public to respond. Why not surprise them?

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Joyce Nelson's latest book is [Bypassing Dystopia: Hope-filled Challenges to Corporate Rule](#) (Watershed Sentinel Books, 2018). It is the sequel to [Beyond Banksters: Resisting the New Feudalism](#) (Watershed Sentinel Books, 2016). Nelson can be reached via www.joycenelson.ca

Notes

[1] Josh Wingrove (Bloomberg News), "U.S.-Canada NAFTA talks are poised to come to a head this week," Financial Post, September 17, 2018.

[2] Ibid.

[3] Mike Ludwig, "Hundreds of State Lawmakers Want a NAFTA Without Corporate Tribunals," truthout.org, September 13, 2018.

[4] Ibid.

[5] Ibid.

[6] Janyce McGregor, "Why NAFTA's unloved investor-state dispute chapter may be in rouble," CBC News, September 8, 2018.

[7] Megan Cassella, "Dog days are busy days on trade," politico.com, August 20, 2018.

[8] Tyler Durden, "'Big Trade Agreement Could Be Happening Soon': U.S. Mexico On Verge Of Resolving Key Nafta Negotiation Hurdles," zerothedge.com, August 25, 2018.

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